RECEIVED
JUL 2 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

80-6434

Joseph Green Brown, et al.,

Petitioners,

-vs-

LOUIE L. WAINWRIGHT,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL

THE CAPITOL, Suite 1502
Tallahassee, FL 32301
(904) 488-0290

Counsel for Respondent

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW 3

REASONS FOR NOT GRANTING THE WRIT 5

CONCLUSION 16

CERTIFICATE OF SERVICE 17

TABLE OF CITATIONS

	Page(s)
Cases	
Alford v. State, 355 So.2d 108 (Fla. 1977) cert.denied 436 U.S. 935	11
Brown v. State, 381 So.2d 690 (Fla. 1980)	10
Brown v. Wainwright, 329 So.2d 1327 (Fla. 1981)	2, 5, 6 13, 14
Data Processing Service v. Camp, 397 U.S. 150 (1970)	7
Ex Parte Farley, 570 S.W.2d 617 (KY 1978)	4, 14
Fisher v. United States, 426 U.S. 319 (1976)	7
Gardner v. Florida, 430 U.S. 349 (1977)	1, 3, 4 5, 6, 7 8, 10, 14
Godfrey v. Georgia, 64 L.Ed.2d 398 (1980)	8, 11
Presnell v. Georgia, 439 U.S. 14 (1978)	8
Proffitt v. Florida, 428 U.S. 242 (1976)	2, 5, 13
Rakas v. Illinois, 439 U.S. 128, 139 (1978)	7
Rawlings v. Kentucky, ___ U.S. ___, 65 L.Ed.2d 633 (1980)	7
Sullivan v. Wainwright, case number 79-2721-Civ-JAG, Order rendered June 4, 1981	6, 7
United States v. Pinkney, 543 F.2d 908 (C.A.D.C. 1976)	11
United States v. White, 322 U.S. 694 (1944)	7
Witt v. Wainwright, case number 80-545-Civ-T-GC, United States District Court, Middle District of Florida, Tampa Division	9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Joseph Green Brown, et al.,

Petitioners,

-vs-

LOUIE L. WAINWRIGHT,

Respondent.

PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the Citation To Opinion Below, Jurisdiction, Constitutional and Statutory Provisions Involved found on pages 1 through 4 of the Petition.

QUESTION PRESENTED

The question before this Court is twofold: first, whether the alleged actions of the Florida Supreme Court violate the Fourteenth Amendment right of due process to fair capital appellate review in violation of Gardner v. Florida, 430 U.S. 349, (1977); and, second, concomitant thereto whether Petitioners' right to a effective assistance of counsel, right of confrontation, right to proportionality in capital sentencing

pursuant to Proffitt v. Florida, 428 U.S. 242 (1976), and right against self-incrimination have been abridged.

The decision by the Florida Supreme Court in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981) resolved both issues adversely to Petitioners.

STATEMENT OF THE CASE

Respondent accepts those portions of the Petitioners' Statement of the Case which accurately reflect the judicial sojourn the instant cause has taken. Respondent cannot accept those portions of the statement of the Case which are argumentive, not supported by an appropriate reference to the record below, or have never been adequately developed for review.

Those facts set forth in Brown v. Wainwright are the operative facts applicable for consideration herein:

> Alleging common issues of law and fact, Brown has joined with one hundred and twenty two other persons who seek relief from allegedly unconstitutional sentences of death. The dominant theme in the multiple request for relief is the alleged impropriety of this Court's having considered, in the course of reviewing sentences of death, documents which were not made available to the defendants' counsel. For most of the petitioners, the alleged impropriety was the court's consideration of undisclosed documents not related to the proceedings in which their sentences were imposed and upheld, but seen in the course of reviewing death sentences approved or considered for other criminal defendants.
>
> [392 So.2d at 1328-1329]

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The question before the Supreme Court of Florida was whether the alleged actions of the Florida Supreme Court in "the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and was not a part of the trial record or a record on appeal", to-wit: pre-sentence investigation reports, psychiatric evaluations, or contact notes made in the corrections system after conviction and psychological screening reports made after conviction by corrections personnel, and other documents; resulted in a "rash of constitutional violations ranging from a denial of due process in individual cases where information was received on one hand to a pervasive violation of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) in all cases reviewed and affirmed by the court, on the other hand. In short, Petitioners contend that our alleged misconduct requires our invalidation of all death sentences imposed or approved in Florida and by necessary implication, that we declare Florida's death penalty statute invalid and unconstitutional in its operation." [392 So.2d at 1331]

In resolving these mammoth yet unspecified constitutional infirmities, the Florida Supreme Court ruled: (1) that a class had not been properly joined, but "to avoid absurd technicalities, however, we decline to treat each petitioner as it were separately filed and enter a separate order or opinion on each. Rather, our disposition of Brown's Petition effectively disposes of all claims for relief of those petitioners who have joined with Brown. In the future, attempts to create a class action habeas corpus proceeding in situations such as this will be rejected summarily.. . ." [392 So.2d at 1330] and, (2) that the court's role after a death sentence had been imposed is

to "review" the imposition of death to determine first whether "procedural rectitude has been applied pursuant to § 921.141, Fla.Stat., and case authority", and second to ensure "relative proportionality among death sentences which he been approved statewide." [392 So.2d at 1331]. The court went on to say:

> Neither of our sentence review functions, it will be noted, involves weighing or re-evaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation is not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.
>
> [392 So.2d 1331]

The court concluded that Gardner v. Florida, was not applicable to appellate review proceedings citing to Ex Parte Farley, 570 S.W.2d 617 (KY 1978) wherein a similar result obtained.

REASONS FOR NOT GRANTING THE WRIT

All one hundred and twenty three Petitioners herein allege that their consititutional rights have been violated. Generally, they assert that the Supreme Court of Florida violated their right to due process to a fair appellate review because the court presumably in an unidentified number of cases requested and received information beyond the trial record, thus, violating this Court's decision in Gardner v. Florida, 430 U.S. 349 (1977). They further contend, based on this major assertion, that they were denied the right to effective assistance of counsel, denied the right to confrontation, denied their Eighth Amendment right to proportionality in capital sentencing in violation of Proffitt v. Florida, 428 U.S. 242 (1976) and denied their right against self-incrimination and the right of assistance of counsel in exercising said rights.

The Florida Supreme Court in Brown v. Wainwright, supra, found their claims wanting. The court ruled that Petitioners' Eighth Amendment right to proportionality in the imposition of capital sentences had not been violated and noted that the assortment of constitutional violations tangential thereto was not presented in a compelling fashion.

A cursory review of the pleadings filed sub judice and the Petition for Writ of Habeas Corpus filed in the Florida Supreme Court reveals that not one of the one hundred and twenty three Petitioners has asserted facts peculiar to his case that would support the claims of constitutional infirmities argued. The right to due process, effective assistance of counsel, the right to confrontation, and the right to protect oneself against

self-incrimination and to have the assistance of counsel in determining same are individual claims which must be individually asserted. The general allegation, that one hundred and twenty three individuals' constitutional rights have been violated without specifics does not satisfactorially raise a cognizable claim to be reviewed by this Court. Albeit it appears there is a "common" constitutional violation alleged, to-wit: that proportionality in the imposition of capital sentences has been marred, there are members of the group who, within the perimeters of their own pleadings, fall outside the complained of period. See United States District Judge Gonzalez' Order in Sullivan v. Wainwright, case number 79-2721-Civ-JAG, Order rendered June 4, 1981. (Appendix I).

Respondent in its Motion to Dismiss the Petition for Writ of Habeas Corpus in the Florida Surpeme Court argued two grounds: (1) that proportionality in sentencing had not been disrupted and there was no violation of Gardner v. Florida, supra, and (2) that there were no facts and circumstances of each Petitioner developed to provide the Florida Supreme Court an opportunity to review the merits of individual contentions.

The court in Brown v. Wainwright, supra, concluded:

> It is evident, once our dual roles in the capital punishment scheme are fully appreciated, that non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel plays no role in capital sentence "review". That fact is obviously appreciated by the United States Supreme Court for it very carefully differentiated the sentence "review" process of appellate courts from the sentence "imposed" function of the trial judges in Proffitt and in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

[392 So.2d at 1332, 1333]

The gravamen of Petitioners' pleading is that the Florida Supreme Court violated Gardner v. Florida, supra, in that they received information which was "de hors" the record proper. They do not assert generally or specifically that the court used said information, nor can they point to any one of one hundred and twenty three cases where the rendition reflects usage or where actual prejudice occurred. (Respondent is not unmindful of Petitioners' general contentions of several constitutional infirmities, to-wit: violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution).

As noted by this Court in Rakas v. Illinois, 439 U.S. 128, 139 (1978):

> It should be emphasized that nothing we say here casts the least doubt upon cases which recognize that, as a general proposition, the issue of standing involves two inquiries: first, whether the proponent of the particular legal right has alleged "injury in fact", second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties.

This court in footnote eight further noted:

> This approach is consenant with that which the court already has taken with respect to the Fifth endment privilege against self-incrimination which also is a purely personal right.
>
> [Id. at 140]

See also, United States v. White, 322 U.S. 694 (1944); Data Processing Service v. Camp, 397 U.S. 150 (1970); Fisher v. United States, 426 U.S. 319 (1976); and Rawlings v. Kentucky, ____ U.S. ____, 65 L.Ed.2d 633 (1980).

A cursory inspection of four of the group of one hundred and twenty three demonstrates the lack of any "injury in fact". Petitioner Robert A. Sullivan attempted to file amended pleadings to his federal habeas corpus action in Sullivan v. Wainwright, case number 79-2721-Civ-JAG, United States District

Court, Southern District of Florida alleging:

> In Brown, the class alleged that: "This court, (Supreme Court of Florida) since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. Brief of Petitioners-2"
>
> Respondents correctly point out that petitioner's capital sentence was reviewed by the Supreme Court of Florida in 1974, prior to the time period covered by Brown v. Wainwright. See Sullivan v. State 303 So.2d 632 (Fla. 1974), cert.denied 428 U.S. 911 (1976). It is accordingly,
>
> Ordered and adjudged that Petitioner's Motion for Leave to file ended Pleadings be and same is denied.
>
> [Order dated June 4, 1981, Sullivan v. Wainwright, case no. 79-2721-Civ-JAG, United States District Court, Southern District of Florida]

While Sullivan may assert that he should be entitled to relief if Florida Supreme Court's actions violated Gardner v. Florida, supra, absent said finding by this Court, Sullivan cannot prevail. What harm has he demonstrated? How has his constitutional right to confrontation been violated? Sullivan's appellate review occurred prior to the commencement of the alleged illegal practices. In Godfrey v. Georgia, 64 L.Ed.2d 398 (1980) though this Court reversed Godfrey's death sentence and remanded the case for further disposition, the Georgia death penalty statute and all Georgia death sentences were not struck down, but rather, only those death sentences challenging the applicability of the phrase "outrageously or wantingly vile, horrible, or inhuman in that they involve . . . depravity of mind . . ." were remanded to the State Court for further disposition for the reconsideration of each particular case. See also Presnell v. Georgia, 439 U.S. 14 (1978).

Petitioner Johnny Paul Witt, similarly took his claim

to federal court in Witt v. Wainwright, case number 80-545-Civ-T-GC, United States District Court, Middle District of Florida, Tampa Division, and found an unsympathetic ear before United States District Judge Carr. In an order dated May 14, 1981, (Appendix II) the District Court ordered that Respondent's Motion to Dismiss ground 12(i) of the amended petition be granted. Following oral argument on the motion held April 3, 1981, Judge Carr concluded Witt's claims were meritless. The court noted:

> It is manifest from the Florida death penalty statute, § 921.141, that the trial judge, following receipt of the jury's sentencing recommendation, weighs the evidence of aggravating and mitigating circumstances and imposes sentence. The Supreme Court of Florida's sole function under the statute is review of that sentence for procedural propriety and proportionality among other Florida death sentence cases. Brown, supra, at 1331. The weighing or evaluating of aggravating and mitigating circumstances is not a part of the Florida Supreme Court's function, and non-record information therefore plays no part in its review. Id. at 1332.
>
> Because the Florida Supreme Court function in capital cases is narrowly confined to reviewing sentences for procedural regularity and proportionality, Gardner v. Florida, 430 U.S. 349 (1977) is inopposite. Gardner held that it is a denial of due process for the trial court to impose a sentence of death where it is based, at least in part, on information which the defendant has no opportunity to deny or explain. 430 U.S. at 362. Since under the Florida death penalty statute, it is the trial court and not the Supreme Court of Florida that imposes sentences in capital cases, the fact that the Florida Supreme Court has ailable non-record information in the performance of its review function does not rise to the level of a Gardner violation. See Ex Parte Farley, 570 S.W.2d 617 (Ky. 1978) . . .

[Order dated May 14, 1981, pages 2-3]

Petitioner Witt has yet to present so much as one fact which would support his contention that his constitutional rights had been violated. What injury has Witt suffered?

Petitioner Joseph Green Brown, on the other hand, the lead-off name in this pleading, may or may not have a reviewable claim. On January 31, 1980, the Florida Supreme Court rendered Brown v. State, 381 So.2d 690 (Fla. 1980). Prior to that rendition, the Florida Supreme Court on May 11, 1977, issued an order with notice to defense counsel, the Honorable J. Michael Shea, for "the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause." On May 11, 1977, the Chief Deputy Clerk of the Florida Supreme Court requested of Mr. Stancil that, " a copy of the latest psychiatric evaluation made on the above-named inmate who is on death row" be sent. On May 16, 1977, Mr. Sid J. White, Clerk of the Florida Supreme Court, received a letter from Harry T. Dodd, Parole Agent Supervisor with the Florida Parole and Probation Commission, indicating that the Florida Parole and Probation Commission's records did not reflect that a pre-sentence investigation was conducted in the first degree murder case, but rather, there was only a pre-sentence investigation done for a charge of robbery against Brown. (Said letters are part of Respondent's Appendix III)

While it appears that the Florida Supreme Court sought further data in Petitioner Brown's case, there is nothing in the instant pleadings to reflect that even if the court obtained this information, any of it was utilized. Assuming for the moment that Gardner v. Florida, is spplicable to appellate reviewing courts, Respondent would tender that in Petitioner Brown's case there has been no allegation that it was used and as observed in Gardner v. Florida, supra, where the trial court had information

not available to Gardner,

> In those cases in which the accuracy of the report is contested, the trial court can avoid delay be disregarding the disputed material.

[51 L.Ed.2d at 403.] (Emphasis added)

Indeed, this Court in denying certiorari in Alford v. State, 355 So.2d 108 (Fla. 1977) cert.denied 436 U.S. 935, refused to review a case where the trial court had information from a pre-sentence investigation report that was not made available to defendant, but was not used. The Florida Supreme Court in addressing said issue held:

> In response to the motion to vacate, the State says that, assuming the judge was "made aware" of certain facts that doesn't mean that he "considered" those facts in imposing sentence. The State draws a distinction between being "aware" of certain facts and "considering" them. We agree.
>
> The United States Supreme Court in Gardner recognized the ability of the sentencing judge to disregard material in imposing sentence. . .

[355 So.2d 109]

See also, United States v. Pinkney, 543 F.2d 908 (C.A.D.C. 1976).

Even assuming at this point that Petitioner Brown's constitutional rights might have been violated, the proportionality in the reviewing of capital sentences has not been so irretrievably harmed that the whole system falls. See Godfrey v. Georgia, supra, where the very integrity of the imposition of a death sentence was challenged and still, the Georgia death penalty statute was not held unconstitutional.

Finally, a review of Petitioner Bernard Bolander's circumstances is interesting in light of the constitutional infirmities he has alleged. At the time Petitioner Bolander and his one hundred and twenty two peers filed their Petition for Writ of Habeas Corpus in the Florida Supreme Court, the only pleading filed in Mr. Bolander's case was a notice of appeal

which had been filed on or about May 29, 1980. Certainly, Mr. Bolander and individuals similarly circumstanced, cannot prove that they were denied assistance of counsel, denied the right to confrontation, denied their right to be protected against self-incrimination, or for that matter, denied proportionalty in appellate review. Mr. Bolander had not even commenced, except for the filing of a notice of appeal, his appellate review.

Respondent would urge that the four petitioners selected sub judice are circumstanced no better or no worse than any of the remaining petitioners. Indeed, each and every one has particlar circumstances which viewed on their particular facts would run the gamut from no constitutional violations to possibly all the constitutional violations asserted. That is the point. What relief can be given any or all of the one hundred and twenty three Petitioners?

The Florida Supreme Court did not recognize these petitioners as a class:

> The joinder here is manifestly designed, at best, to curtail all executions in Florida on legal grounds not yet adjudicated at least, to suspend the imposition of any lawful sentence until new legal issues are resolved. The latter objective of course, has already been achieved. To allow a joinder under these circumstances in future cases would distort habeas corpus beyond recognition and create a pernicious precedent in capital cases. We decline to approve this precedent. Tbere is no justification for joinder in situtations such as this.
>
> To avoid absurd technicalities, we decline to treat each petition as if it were separately filed and enter a separate order or opinion on each. Rather, our disposition of Brown's petition effectively disposes of all claims for relief of those petitioners who have joined with Brown. In the future, attempts to create a class action habeas corpus proceeding in situations such as this will be rejected summarily.
>
> [392 So.2d 1330]

Similarly, Respondent would urge that Petitioners have failed to demonstrate identical or closely related questions which can be resolved by this Court in its granting of further review. The relief the individual petitioners are entitled to is as varied as their number. Respondent would respectfully urge this Court not grant the writ.

The Florida Supreme Court in Brown v. Wainwright, supra, clearly and specifically delineated their function (as they perceived it), pursuant to § 941.121, Fla.Stat. In reviewing the appropriateness of Florida's capital punishment statute, this Court in Proffitt v. Florida, 428 U.S. 242 (1976) cogently dissected the responsibility of this trifurcated system. In Brown v. Wainwright, supra, the Supreme Court held:

> This court's role after a death sentence has been imposed is "review". A process qualitively different from sentence imposition. It consists of two discreet functions. First, we determine if the jury and judge acted with procedural rectitude in applying § 921.141, and our case law. . .
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. Proffitt v. Florida, (cite omitted) . . .
>
> Neither of our sentence review functions, it will be noted, involves weighing or re-evaluating the evidence adduced to establish aggravating or mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating or mitigating circumstances are so supportive, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence

must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation . . .

[392 So.2d 1331] (Emphasis added)

The court went on to say:

> The record of each proceeding and precedent necessarily framed our determination and sentence review. Our opinions, of course, then expound our analysis. Factors or information outside the record play no part in our sentence review role. Indeed, our role is neither more nor less, but precisely the same as that employed by the United States Supreme Court in its review of capital punishment cases illustrative of this court's exercise of the review function in Godfrey v. Georgia, U.S. , 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) . . . .
>
> . . . Since we do not "impose" sentence in capital cases, Gardner represents no impediment to the advertent or inadvertent receipt of non-record information . . .

[392 So.2d at 1332] (Emphasis added)

In Ex Parte Farley, 577 S.W.2d 617 (Ky. 1978) relied on by the Florida Supreme Court in Brown v. Wainwright, the court therein held:

> We do not find it possible to believe that in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court of the United States meant to lay down a principle so pervasive as to require an appellate court to lay for inspection by the appellant, even in a capital case, all the information in its hands from which it may seek perspective and guidance in reviewing the propriety of his sentence. We therefore hold that Gardner does not apply.

[577 S.W.2d at 627]

Respondent would urge that this Court's pronouncement in Gardner v. Florida, supra, was limited to the trial court the "imposer" of the sentence. Petitioners' reliance therefore, on Gardner v. Florida, is totally inapplicable to the circumstances at bar.

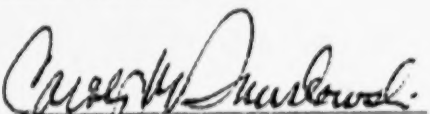
The proportionality of review in capital cases has not been sullied by any practice of the Florida Supreme Court. Only when and if the state or federal courts have had an opportunity to review specific facts in individualize' cases (where each Petitioner has been made to plead and meet his burden) can this Court or any court reasonably review the unsupported allegations made by all these Petitioners.

CONCLUSION

THEREFORE, Respondent would urge, based on the foregoing, that this Court should not grant further review to Petitioners.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

By: 
CAROLYN M. SNURKOWSKI
Assistant Attorney General

THE CAPITOL, Suite 1502
Tallahassee, FL 32301
(904) 488-0290

Counsel for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH GREEN BROWN ET AL VS. LOUIE WAINWRIGHT

Case No. 80-6434

A P P E N D I C E S

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 79-2721-CIV-JAG

ROBERT A. SULLIVAN,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, etc., et al.,
Respondents.

_____/

ORDER

6-8-81

RECEIVED
JUN 8 1981
ATTORNEY GENERALS OFFICE

THIS CAUSE is before the Court for review upon Petitioner's Motion for Leave to file Amended Pleading pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

Petitioner seeks to amend his Petition for Writ of Habeas Corpus to include the allegation contained in the class action petition of Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). In Brown, the class alleged that

> [t]his Court (Supreme Court of Florida), since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. Brief for Petitioners at 2.

Respondents correctly point out that Petitioner's capital sentence was reviewed by the Supreme Court of Florida in 1974, prior to the time period covered by Brown v. Wainwright. See Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911 (1976).

It is accordingly,

ORDERED AND ADJUDGED that Petitioner's Motion for Leave to file Amended Pleading be and the same is hereby DENIED.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida this 4th day of June, 1981.

UNITED STATES DISTRICT JUDGE

cc: all counsel

APPENDIX I

MAY 15 1981

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHNNY PAUL WITT,

Petitioner,

vs. Case No. 80-545-Civ-T-GC

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,
and JIM SMITH, Attorney General,
State of Florida,

Respondent.

_____/

MEMORANDUM OPINION AND ORDER

Before the Court for consideration is the Respondent's Motion to Dismiss ground 12I of the amended petition for writ of habeas corpus. Oral argument regarding the motion was heard by the Court on April 3, 1981.

I. BACKGROUND

In ground 12I of his amended petition, Petitioner argues that in performing its statutory review function of death sentences, the Florida Supreme Court has requested and received, since at least 1975, certain information pertaining to capital appellants which was presented neither at trial nor on appeal and which is not part of the trial or appellate records.[1] A host of constitutional violations under the Fifth, Sixth, Eighth and Fourteenth Amendments are claimed. Because of the unavailability of nonrecord information received pursuant to this practice, Petitioner states that he is unable to determine if the Supreme

1/ According to the amended petition, the information includes (but is not limited to) presentence investigation reports of the offenses under review or of earlier convictions; psychiatric evaluations or conduct notes; psychological screening reports; recitations of capital appellants' refusals to submit to psychiatric examinations; post-sentence investigation reports; and state prison classification and admissions summaries.

Best Copy Available

Court of Florida reviewed such information in his case, but that in any event, even if no such information was requested or received in his case, the Supreme Court's practice of receiving such information regarding other capital appellants violated his Eighth Amendment right to proportionality in capital sentencing.

Petitioner previously asserted this identical claim along with 122 other death row inmates in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). In that case, the Supreme Court of Florida found the claims untenable and denied all relief. Id. at 1333.

II. ANALYSIS

For purposes of the Respondent's motion, the Court has, as it must, accepted all allegations of ground 12I as true. Hospital Building Co. v. Trustee of the Rex Hospital, 425 U.S. 738, 740 (1976); Cruz v. Beto, 405 U.S. 319, 322 (1972). Nevertheless, because this Court agrees with the approach of the Florida Supreme Court in Brown, ground 12I is rejected as meritless.

It is manifest from the Florida death penalty statute, Fla. Stat. §921.141, that the trial judge, following receipt of the jury's sentencing recommendation, weighs the evidence of aggravating and mitigating circumstances and imposes sentence. The Supreme Court of Florida's sole function under the statute is review of that sentence for procedural propriety and proportionality among other Florida death sentence cases. Brown, supra at 1331. The weighing or evaluating of aggravating and mitigating circumstances is not a part of the Florida Supreme Court's function, and nonrecord information therefore plays no part in its review. Id. at 1332.

Because the Florida Supreme Court's function in capital cases is narrowly confined to reviewing sentences for procedural regularity and proportionality, Gardner v. Florida, 430 U.S. 349 (1977), is inapposite. Gardner held that it is a denial of due

Best Copy Available

process for the trial court to impose a sentence of death where it is based, at least in part, on information which the defendant has no opportunity to deny or explain. 430 U.S. at 362. Since under the Florida death penalty statute, it is the trial court and not the Supreme Court of Florida that imposes sentences in capital cases, the fact that the Florida Supreme Court has available nonrecord information in the performance of its review function does not rise to the level of a Gardner violation. See Ex Parte Farley, 570 S.W.2d 617 (Ky. 1978). In light of the above, and in consideration of the fact that the justices of the Florida Supreme Court are frequently cognizant of nonrecord information that they routinely disregard in the performance of their sentence review function, Brown, supra at 1333, the Petitioner has failed to set forth infirmities of constitutional dimension. Therefore, Respondent's Motion to Dismiss ground 12I of the amended petition for writ of habeas corpus is GRANTED.

DONE AND ORDERED in Chambers in Tampa, Florida, this 14th day of May, 1981.

George L. Cox

UNITED STATES DISTRICT JUDGE

Best Copy Available

Supreme Court of Florida

Tallahassee 32301

SID J. WHITE
CLERK
BERNICE L. SAUNDERS
CHIEF DEPUTY CLERK

TELEPHONE:
904-488-0235

May 11, 1977

Mr. Ed Stancil, Director
Department of Offender Rehabilitation
1311 Winewood Blvd.
Tallahassee, Florida 32301

#043546

RE: Joseph Green Brown v. State of Florida
Case No. 46,925

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

Most cordially,

Bernice L. Saunders

Bernice L. Saunders
Chief Deputy Clerk, Supreme Court

BLS/jdw

sent reports 5-13-77
lk.

May 16, 1977

Mr. Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida

Re: Joseph Green Brown
COI 172407
FPC 042546

Pursuant to the Court's Order of May 11, 1977, in case #46-925, the Commission has conducted a search of its records to determine if a pre-sentence investigation was conducted.

The Commission's records do not reflect that a pre-sentence investigation was conducted in Hillsborough County Circuit Court, case #73-2130-C. The Commission did conduct a pre-sentence investigation in Hillsborough County Circuit Court, case #73-1333-C, which charged Robbery and was not related to First Degree Murder.

If this Commission can be of further assistance to the Court, please advise.

Sincerely,

Harry T. Dodd
Parole Agent Supervisor

HTD/ca

Best Copy Available